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No. 1056

In the Supreme Court of the United States

October Term, 1941.

CHESTNUT SECURITIES COMPANY, A CORPORATION,
Petitioner,
vs.
OKLAHOMA TAX COMMISSION, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1941.

No. .....

CHESTNUT SECURITIES COMPANY, A CORPORATION,
Petitioner,
vs.
OKLAHOMA TAX COMMISSION, *Respondent.*

PETITION FOR WRIT OF *CERTIORARI.*

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Chestnut Securities Company, your petitioner, being aggrieved of a judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered January 16, 1942, in its cause numbered 2289, styled Chestnut Securities Company, appellant, *vs.* Oklahoma Tax Commission, appellee, respectfully petitions review thereof upon the issues of law hereafter stated, praying writ of *certiorari* for the purpose, and as cause and ground therefor respectfully shows:

I.

Statement of Matter Involved.

Petitioner is a Delaware corporation. Respondent is the tax collection agency of the State of Oklahoma.

Petitioner was compelled to pay an Oklahoma tax upon income derived from sources outside the state. This action sought recovery of the tax which was paid under protest. The action is at law, and is expressly authorized by legislative permission of the state. (Title 68, Oklahoma Statutes 1941, Section 1475, Title 68, Oklahoma Statutes Annotated, Section 1475.)

The income in question was the product of large fixed investments in intangible securities which were acquired, held and serviced at all times elsewhere than in Oklahoma. It consisted of interest on notes and bonds, dividends upon corporate stocks, and capital gains realized upon occasional sales of stocks. The tax years in issue were 1936, 1937 and 1938, during which the petitioner held license to do business in Oklahoma.

Nearly all of the subject intangibles were acquired by petitioner in exchange for its original capital stock. They were in no instance acquired as a result of business operations in Oklahoma, nor were they in any instance purchased with the proceeds of Oklahoma transactions. They were acquired in exchange for the original capital stock of the corporation, or were replacements of intangibles so acquired, or were purchased out of the profits or proceeds of intangibles so acquired.

Petitioner's principal corporate objective was and is the acquisition and holding of intangible investments. Petitioner did not broker or deal in stocks, did not purchase or sell them for immediate speculative profits, and did not make marginal purchases or sales at all. Its securities were acquired as fixed investments, and were held for their yield in dividends and interest. Its transactions in securities were limited to infrequent liquidations and replacements dictated by considerations of investment policy. As a secondary pur-

pose and objective petitioner sought and acquired investments in oil properties in the States of Oklahoma and Texas. Its holdings in intangibles represented in excess of ninety per cent (90%) of its whole investment, and its oil properties represented less than ten per cent (10%). Its investment in Oklahoma varied from less than one per cent (1%) to slightly more than two per cent (2%) of its total holdings.

As will subsequently appear, the intangibles were held, handled and disposed of wholly outside Oklahoma, and were never employed in or associated with petitioner's Oklahoma transactions.

Petitioner voluntarily returned to Oklahoma its income derived from oil properties located within the state. It paid the tax attributable thereto. By appropriate proceedings the respondent entered a deficiency assessment whereby the whole of petitioner's income from intangibles was subjected to Oklahoma income tax. The deficiency assessment was protested and petitioner's administrative remedies were exhausted. The amount of the assessment was Six Thousand Three Hundred Seventy-five Dollars Fifty-eight Cents ($6,375.58), which amount is stipulated to be correct if petitioner's intangible income be lawfully subject to the tax. The tax was paid under protest.

Petitioner sued to recover the tax in the District Court of the United States for the Western District of Oklahoma. Jurisdiction was claimed by diversity of citizenship and requisite amount, and also upon the ground that a federal constitutional question was involved. The state consented to the suit by the terms of Section 1475 of Title 68, Oklahoma Statutes 1941.

The trial was to the court without a jury and resulted in a judgment in favor of the respondent Tax Commission. Appeal was taken to the United States Circuit Court of

Appeals for the Tenth Circuit, which affirmed the trial court. This petition is to review the latter judgment.

The preliminary administrative procedure is admitted to be sufficient, and the jurisdiction of the United States Courts has not been questioned.

The original deficiency assessment based respondent's demand on the ground that petitioner, notwithstanding its domicile in Delaware, was a domestic corporation for tax purposes within the terms and meaning of Section 5 (b) of Oklahoma Income Tax Act of 1935 (Appendix to Title 68, Oklahoma Statutes Annotated, Chapter 66, Article 6, Section 5 (b), Oklahoma Session Laws 1935), the pertinent provisions of which are as follows:

> "*(b)* The term 'resident,' as herein used, refers not only to a resident individual, as defined in Section 4 (j) but, in addition, refers to and includes any corporation whose principal business is carried on or transacted in Oklahoma. Such a corporation shall be deemed to be a resident of this state, for income tax purposes, and its income shall be determined, and the tax thereon collected and paid, as if it were incorporated under the laws of Oklahoma, notwithstanding its corporate domicile is elsewhere."

Respondent first contended that petitioner was a "resident" within the foregoing provision, and therefore that its intangibles, wherever located, and the income therefrom, were subject to taxation in Oklahoma.

To this first contention of the respondent petitioner replied:

> *First,* that petitioner was not within the terms of the section quoted, for the reason that its "principal business" was not carried on or transacted in Oklahoma.
>
> *Second,* that the statute invoked contravened the

"due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

The answer of the respondent to petitioner's suit asserted a second justification of the assessment. It pleaded that petitioner's securities had acquired "business situs" within the State of Oklahoma and therefore that the increment thereof was subject to the state income tax. This contention was proposed as justification of the tax independent of applicability or validity of the statute quoted above.

In reply to this second proposition of the respondent, petitioner urged that definition of "business situs" is a matter of local law, to be determined exclusively by the decisions of the courts of Oklahoma, and that the Supreme Court of Oklahoma had theretofore held these very intangibles of this very petitioner not to have "business situs" in Oklahoma. See *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 173 Okl. 369, 48 P. (2d) 817.

Thus the legal issues presented to the trial court were three in number:

First, was or was not petitioner's "principal business" carried on in Oklahoma during the years 1936, 1937 and 1938 within the intent and meaning of Section 5 (b) of Oklahoma Income Tax Act of 1935, quoted above?

Second, if the first issue be determined in the affirmative, does the said Section 5 (b) contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States?

Third, did or did not the intangible investments of petitioner, during the years in question, have "business situs" as defined by the decisions of the Supreme Court of Oklahoma?

All three questions were presented to the trial judge. From his conclusions of law (Tr. 28) it appears that he found the constitutional question unnecessary of decision, and placed his judgment upon a conclusion that the intangibles involved had "business situs" in Oklahoma. In so doing the trial judge ignored the decision of the Supreme Court of Oklahoma in *Chestnut Securities Company* v. *Oklahoma Tax Commission, supra,* and the decision of this court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. ed. 1188.

The Circuit Court of Appeals, while directly affirming the trial court, avoided the "business situs" question. It preferred to pitch its judgment upon the ground that petitioner was within the terms of the statute quoted above and that the statute was constitutional. If its conclusion in this regard be correct the determination of the "business situs" question becomes unnecessary. The appellate court's holding therefore amounts to a finding upon the record that petitioner's "principal business" was transacted in Oklahoma and that the statute defining petitioner to be a resident for tax purposes did not violate the Fourteenth Amendment.

The issues of the case were wholly of law. At the conclusion of the evidence there remained no single issue of fact. The evidence consisted of the testimony of a single witness, which is found at pages 33 to 44 of the transcript. From the admissions of the pleadings and the evidence the following matters appear without dispute.

Petitioner's domicile is Delaware. Its charter objectives are the acquisition and holding of intangible securities and oil properties.

At its charter date, December 22, 1931, petitioner exchanged the whole of its capital stock for large amounts of stocks, bonds, and notes, and a small business building lo-

cated in Tulsa, Oklahoma. The intangibles represented more than ninety per cent (90%) of the gross assets received, and the business building represented less than ten per cent (10%). The intangible securities were thereafter and to this date held for their earnings in interest and dividends. The office building was operated for its rent for one year and was sold in December of 1932. During the years 1933 and 1934 petitioner's assets were wholly intangible. In 1935 petitioner acquired some oil royalties in Texas. The oil investments were added to in the years 1936, 1937 and 1938, by acquisitions in both Texas and Oklahoma.

Petitioner opened two offices at which it transacted its business. They were located respectively at Wilmington, Delaware, and Tulsa, Oklahoma. The Delaware office handled the intangibles. The Tulsa office handled the office building and the oil investments. The two fields of investment were wholly unrelated except that the oil properties were purchased from profits of the intangibles.

The intangible securities were first received by petitioner at its Delaware office. The physical evidences thereof were placd in deposit vaults in Wilmington, Delaware, and Pittsburgh, Pennsylvania, in charge of its employees or agents. They have remained there ever since except as they have been discharged, sold, or replaced by transactions upon the New York markets. Stocks or bonds were invariably delivered and received at the Delaware office or at Pittsburgh, Pennsylvania. Dividends upon the stocks were invariably received and accounted for at the Delaware office. Sales or purchases of intangibles were invariably executed upon the New York exchanges. Accounting entries affecting the intangibles were invariably made at the Delaware office. Proceeds of sales, interest and dividends were invariably received either at Wilmington, Delaware, or Pittsburgh, Pennsylvania, and deposited and held in bank accounts at these

two cities. A third bank account was maintained in St. Louis, Missouri. No stock certificate or bond or note was ever physically present within the borders of the State of Oklahoma. No stock, bond, or note was purchased or acquired in the State of Oklahoma. No such security was ever sold in Oklahoma. No dividend nor sum of principal or interest was ever received or receivable within the State of Oklahoma. No delivery of intangible securities upon either purchase or sale was ever made within Oklahoma. No bank account of petitioner was ever kept in Oklahoma. The intangibles in question were in no instance purchased with proceeds of any Oklahoma operation. Upon the other hand, the purchases of oil properties in Oklahoma were made out of the earnings of petitioner's intangible investments.

Petitioner first qualified to do business in Oklahoma in 1931. This was necessitated by its ownership of the business building at Tulsa. After the sale of the building in December of 1932, its license in Oklahoma was permitted to lapse. During the years 1933, 1934 and 1935 petitioner owned no property of any description in Oklahoma, and was not qualified there. In October of 1936 petitioner purchased a small oil royalty which was located in Oklahoma and again qualified. During the years 1937 and 1938 petitioner acquired other oil investments in the state and maintained its license to do business.

As between petitioner's oil investments and its intangible investments the following division of its physical functions was maintained. Its oil investments in Oklahoma and Texas were supervised from its Tulsa office where petitioner maintained one employee. This office received the proceeds of corporate operations in Oklahoma which consisted entirely of oil and gas sales. The run checks were received at Tulsa, appropriate entry of the receipt was made upon a separate account for each mineral property and the checks

were forwarded direct to Pittsburgh, Pennsylvania, for deposit in the corporate account with Union Trust Company. No other business function was discharged at Tulsa.

All matters relating to the handling of the intangibles and their proceeds were conducted at Wilmington, Delaware, as above set forth. The Delaware office had but one employee as will subsequently appear.

The oil investments and the intangible investments were wholly separated upon the accounting records of petitioner and were wholly separate in employee handling.

The corporation never dealt in intangibles in the sense that the same were bought and sold for immediate profit. Petitioner never sold intangibles as a broker or upon commission. It never underwrote any securities or dealt with the same otherwise than as for income investment. The corporation never speculated in intangibles as that term is commonly understood in connection with purchases or sales upon margin. All transactions of purchase or sale were for full and immediate payment of cash considerations.

The corporate investment in intangibles at all times exceeded ninety per cent (90%) of its total invested assets.

The record will reflect no issue upon any of the foregoing representations of fact. However, the record likewise discloses no issue of fact upon the following circumstances which are less favorable to the contentions of the petitioner.

During the years 1936, 1937 and 1938 all of the stockholders and all of the directors were residents of Oklahoma. All of the officers excepting one assistant secretary were residents of Oklahoma. An assistant secretary resided at Wilmington, Delaware. All directors' meetings were held at Tulsa, Oklahoma. No intangible securities were bought or sold during the years in question except by authorizing resolutions of the directors who met at Tulsa.

All checks drawn upon the corporate bank accounts outside Oklahoma were signed by officers at Tulsa, Oklahoma, and no one had any authority to draw checks upon the said account except officers who were residents of Oklahoma.

The board of directors residing and meeting at Tulsa supervised all of the business of the corporation.

The corporate office at Wilmington, Delaware, was in charge of an assistant secretary who received Twenty-five Dollars ($25.00) per month for the years in question. The assistant secretary was a practicing attorney of Delaware, and the office of the corporation was in the same rooms occupied by the officer as an attorney at law. The corporation did not expend any sum for office rent but the above payment was its total expense for office and services in Delaware. However, the assistant secretary was a direct employee of petitioner and is not an employee or agent of any corporation service company.

Sales of intangibles occurring in 1937 and 1938 were ordered by the directors of petitioner meeting at Tulsa. The sales were executed elsewhere than Oklahoma by employees and agents of the corporation. Profits were realized on these sales.

Thus all trading in intangibles by petitioner with other persons and corporations, and all servicing functions affecting its intangible investments were conducted elsewhere than in Oklahoma. However, all policy making functions, or intra-corporate determinations were discharged by its directors meeting at Tulsa, Oklahoma. In other words, petitioner did its trading in stocks and its accounting and servicing of the same outside the state, but it made up its corporate mind to trade, at Tulsa, Oklahoma.

The trial court and the Circuit Court of Appeals held that the policy making determinations of the board of di-

rectors were "transacting the principal business" of petitioner and that, therefore, it was subject to the provisions of the statute quoted above. It further held the statue consitutional.

II.

Jurisdiction.

The original jurisdiction of the federal courts is founded upon diversity of citizenship and an amount in excess of three thousand dollars involved. The record likewise presents a federal constitutional question in that a state statute, or the application thereof, is charged to violate the terms of the Fourteenth Amendment to the Constitution of the United States.

Jurisdiction of this court to review the judgment of the Circuit Court of Appeals is claimed under the provisions of Subsection (a) of Section 347 of Title 28, United States Code Annotated, being Section 240 of the Judicial Code as amended. The review is sought by writ of *certiorari.*

The statute of Oklahoma, the validity of which is involved, is Section 5 (b) of Oklahoma Income Tax Act of 1935, published in Appendix to Title 68, Oklahoma Statutes Annotated, and being Chapter 66, Article 6, Section 5 (b), Session Laws of Oklahoma 1935, which is in terms as set forth, *supra,* page 4.

The applicability of the above statute to petitioner, and the constitutional validity of the statute, if applicable, were placed directly in issue by the pleadings; by a motion for judgment upon the pleadings and undisputed evidence, duly excepted to; and were raised in the Circuit Court of Appeals by specification as required by the Rules of Civil Procedure. Both questions were decided directly and adversely to the petitioner by the Circuit Court of Appeals.

The judgment of the Circuit Court of Appeals, which this petitioner seeks to review, was entered upon January 16, 1942. This petition will be presented to this court upon March 19, 1942.

Copy of the opinion of the Circuit Court of Appeals is found in the transcript beginning at page 48.

III.

Questions Presented.

The review prayed for by this petition will present the following questions:

(1) During the years 1936, 1937 and 1938, did or did not petitioner transact its "principal business" in Oklahoma within the intent and meaning of Section 5 (b) of Oklahoma Income Tax Law of 1935?

(2) In connection with decision of the first question stated above, did or did not the Circuit Court of Appeals transgress the rule announced in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 53, 82 L. ed. 1188, by ignoring the implications of the decision of the Supreme Court of Oklahoma in *Chestnut Securities Co.* v. *Oklahoma Tax Commission,* 173 Okl. 369, 48 P. (2d) 817?

(3) Does or does not Section 5 (b) of Oklahoma Income Tax Law of 1935, being Chapter 66, Article 6, Section 5 (b), Session Laws of Oklahoma 1935, infringe the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States?

(4) In the event that one or another of the above questions be decided favorably to petitioner, there will be presented the additional question of whether or not petitioner's intangibles had such "business situs" in Oklahoma as to render the income therefrom taxable independent of the validity or appli-

cability of the statute cited. Upon this issue petitioner will again invoke the rule of *Erie Railroad Company* v. *Tompkins, supra,* in favor of the decision of the Supreme Court of Oklahoma in the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission, supra.*

IV.

Reasons for Allowance of the Writ.

Petitioner, as reasons for the allowance of the writ of *certiorari* prayed for, proposes the following:

(1) The Circuit Court of Appeals has decided an important question of local law erroneously and in a way probably in conflict with the applicable local decisions. We refer to the construction given Section 5 (b), Oklahoma Income Tax Law of 1935, *supra,* by the Circuit Court of Appeals in the face of the decision of the Supreme Court of Oklahoma in *Chestnut Securities Co.* v. *Oklahoma Tax Commission, supra,* which is fully discussed in the appended brief.

(2) The Circuit Court of Appeals has decided a question of federal constitutional law in a way probably in conflict with the applicable decisions of this court; and certainly in conflict with the decision of the Supreme Court of Wisconsin in the case of *Newport Co.* v. *Wisconsin Tax Commission,* 219 Wis. 283, 261 N. W. 884, which is identical in point of fact and law, and which this court declined to review upon petition for *certiorari,* 297 U. S. 720.

Wherefore petitioner prays that writ of *certiorari* shall issue addressed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said court to certify and send to this Court for review and determination a full and complete transcript of the record and all of its pro-

ceedings in the certain cause numbered 2289 upon its dockets, entitled *Chestnut Securities Company, a corporation, appellant,* v. *Oklahoma Tax Commission, appellee,* and that upon such writ and review the judgment of the said United States Circuit Court of Appeals for the Tenth Circuit, made and entered upon January 16, 1942 in the cause designated above, shall be reversed, and that the judgment of the trial court affirmed thereby shall likewise be reversed and set aside with directions to enter judgment in favor of this petitioner for the reliefs and sums first sued for.

Petitioner further prays that it shall have such other and further relief in the premises to which this court shall find it duly entitled.

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BRIEF IN SUPPORT OF PETITION.

Jurisdiction.

Jurisdiction of this Court to review the judgment of the Circuit Court of Appeals complained of is claimed under the provisions of Subsection (a) of Section 347 of Title 28, United States Code Annotated, being Section 240 of the Judicial Code as amended. The review is sought by writ of *certiorari*. The judgment complained of was entered upon January 16, 1942. (Tr. 58) The attached petition is filed within the period allowed for the purpose by Section 350 of Title 28, United States Code Annotated.

Statement.

To avoid repetition the Court is respectfully referred to "Statement of Matter Involved" as contained in the foregoing petition for writ of *certiorari* for full statement of the facts presented by the record which is sought to be reviewed.

ARGUMENT.

The decision of the Circuit Court of Appeals which is sought to be reviewed here is pitched upon two conclusions of law.

The first of these is that the petitioner "transacted" its "principal business" within the State of Oklahoma and therefore was a resident within the intent and meaning of Section 5 (b) of Oklahoma Income Tax Act of 1935 notwithstanding its corporate domicile in Delaware.

The court's second conclusion was that the said Section 5 (b), as construed and applied to this petitioner, did not

contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

We respectfully urge that both of the above conclusions are erroneous.

The issue upon which the first conclusion was reached resolves itself into a construction of the language of the statute itself. We hope by this brief to demonstrate that the construction given the act by the Circuit Court of Appeals is erroneous by any rule of decision. Further, we hope to demonstrate that the rule of construction applied by Oklahoma to its own similar statutes was readily ascertainable from the published opinions of the Supreme Court of that state, but that the Circuit Court of Appeals disregarded the same contrary to the rule announced in *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. ed. 1188. Petitioner's argument therefore naturally stands or falls upon its ability to maintain one or the other of the following contentions:

(1) Petitioner did not "transact" its "principal business" in Oklahoma during the years in question.

(2) Relevant decisions of the Supreme Court of Oklahoma preclude the construction given the statute by the Circuit Court of Appeals.

If the facts of this case be held sufficient to identify petitioner as a "resident" under the statute in question, we respectfully urge that the statute itself, as construed, and its application to petitioner in the instant situation, contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States. We shall hope to demonstrate the infirmity of the statute and its application by the opinions of this Court cited by the Circuit Court of Appeals as the basis for its judgment. We shall further show upon this issue that the deci-

sion of the Circuit Court of Appeals is in direct conflict with a decision of the same constitutional question by the Supreme Court of Wisconsin, which this Court has declined to review.

We address ourselves to the first of our contentions:

I.

Petitioner Did Not "Transact" Its "Principal Business" in Oklahoma During the Years in Question.

The statute applied to and enforced against the petitioner was Section 5 (b) of Oklahoma Income Tax Act of 1935, published in appendix to Title 68, Oklahoma Statutes Annotated, and being Chapter 66, Art. 6, Oklahoma Session Laws, 1935. The full text of the questioned statute follows:

> "The term 'resident,' as herein used, refers not only to a resident individual, as defined in Section 4 (j), but, in addition, refers to and includes any corporation whose principal business is carried on or transacted in Oklahoma. Such a corporation shall be deemed to be a resident of this State, for income tax purposes, and its income shall be determined, and the tax thereon collected and paid, as if it were incorporated under the laws of Oklahoma, notwithstanding its corporate domicile is elsewhere."

The respondent and the trial and appellate courts concluded that petitioner's "principal business is carried on or transacted in Oklahoma," that therefore petitioner was a "resident" of Oklahoma by virtue of the statute, and therefore that its intangible properties had tax situs in Oklahoma and the income therefrom was subject to the Oklahoma income tax. The conclusion reached obviously turns upon the construction of the words "principal business is carried on or transacted."

If the mere meeting of directors of a corporation, by

which a course of corporate action is resolved upon, is held to be "transacting business" then petitioner is within the terms of the statute, for there can be no doubt from this record that petitioner's directors held their infrequent meetings within the State of Oklahoma.

If, however, the words "transacting business" be held to mean something other than the mere determination to enter upon a commercial venture, and to refer rather to the commercial traffic, contracts and exchanges undertaken and discharged by petitioner as a corporation with other persons and corporations upon the open markets and channels of trade, then there can be no doubt that petitioner's "principal business" was "transacted" elsewhere than in Oklahoma.

The Circuit Court of Appeals had no difficulty in concluding that petitioner's "principal" business was the acquisiton and holding of intangible investments. It even observed that the corporate investment in mineral properties was of but little consequence in determining the questions involved in the case. We are therefore constrained to confine our discussion, as did the Circuit Court of Appeals, to the corporate operations in connection with its intangible investments, which represented more than ninety per cent (90%) of its entire holdings.

Does a corporation "transact business" within the meaning of the above statute, when its directors meet and resolve that a certain stock should be bought or sold at a stated figure, or does it transact its business within the contemplation of the statute when its officers and agents seek out and approach other trading persons or entities and negotiate and conclude with them the barter determined upon by the directors? If the intra-corporate, policy-determining action of the directors dealing with themselves and each other is the test, the petitioner transacted its business at Tulsa. If

the business transaction referred to by the statute is the dealing of the corporation as an entity with strangers upon the open markets of trade, then each and every function of its business was discharged elsewhere than in Oklahoma.

The only factor of petitioner's dealings in intangibles which is in any degree related to Oklahoma is the occasional meetings of petitioner's directors which took place at Tulsa. Such intangibles as were sold were sold in New York. Such intangibles as were bought were bought in New York. The physical evidences of the intangible property were never within Oklahoma but always were within custody of corporate officers or agents either in Pennsylvania or Delaware. The earnings of the intangible investments were receivable and received at the Delaware office. Accounting of the same was made in the Delaware office. Deliveries of the intangibles were made and received at the Delaware office to or from brokers in New York. The corporate bank accounts were kept at all times outside the State of Oklahoma. The ebb and flow of its moneys occurred solely outside the said state and fluctuated in no important particular by reason of Oklahoma investments or operations.

The fallacy of the conclusion reached by the respondent and the lower courts is perhaps well illustrated if the circumstances be reversed. Suppose the directors' meetings had been held in Delaware, and nothing else had been done there. Suppose that the intangible securities were held, serviced and accounted for in Oklahoma. Suppose that all purchases and sales were contracted for in Oklahoma with residents of Oklahoma. Suppose all deliveries pursuant to purchase or sale were executed upon the markets of Tulsa. Suppose the bank accounts and accounting records had been kept at Tulsa. Would the respondent then say that petitioner's "principal business" was "transacted" in Delaware? We think not.

We regret that we are unable to cite any controlling authority that is directly in point. However, we are able to cite an opinion, of a reputable court, which we believe to be persuasive in the construction debated. We refer to the decision of the Supreme Court of Michigan in the case of *Teagen Transportation Company* v. *Board of Assessors of Detroit*, 139 Mich. 1, 102 N. W. 273, 69 L. R. A. 431. In this case the court undertook construction of a statute which provided for the taxation of personal property of a corporation at the place where it "transacts its principal business." The corporation in question was chartered in Delaware, at which place the meetings of its stockholders and directors were held. All of its other functions were discharged at its office in Michigan. The following is the gist of the decision of the court.

> "Unless we decide that the holding of annual meetings of stockholders and directors is the principal business of said corporations, we must hold that that principal business was not transacted at the place named in the articles of incorporation. It is true that we held in *Detroit* v. *Lothrop Estate Co.*, 11 Det. L. N. 6, 99 N. W. 9, that the principal business was done at the office where the manager resided, and where the managers and shareholders 'meet to do whatever is necessary for them to do.' This by no means decides that the annual meeting of stockholders constitutes the principal business of the corporation. To so hold would, in my judgment, clearly frustrate the legislative purpose. It is said that the personal property of the corporation should be taxable at the place 'where its office is located in its articles of incorporation: * * * *Provided*, its business is actually transacted at such office.' By 'business' the legislature meant something more than the annual meeting of stockholders and newly chosen directors. If it did not, other and more appropriate language would surely have been used. We come, then, to the question, had the lower court the right to infer that the relator corporation did

such business in the City of Detroit as to make their personal property taxable there? We have shown that substantially all the business of relator the Teagen Transportation Company was done in Detroit; that the treasurer of the other relators resided in Detroit had (and, it may be inferred, there exercised) superior powers of business management, and that he there received and disbursed the funds of said corporation except those disbursed for the ordinary running expenses of their boats. If the holding of annual meetings of stockholders and directors did not constitute the principal business of the corporation (and we have stated in our judgment it did not), it follows that the personal property of the corporation was taxable either at the place where it established an 'office for the transaction of its principal business, or, if it had no principal office, then at the place in this state where such corporation transacts business'."

The authority is neither controlling nor entirely satisfactory, but it is as close to the exact issue to be decided as we can find. The case of *People, ex rel. General Electric Company*, v. *Barker*, 91 Hun. 590, 36 N. Y. S. 842, announces the general proposition that the *locus* of management is not necessarily the principal place of business, but the case presents a fact situation which is essentially different from the one here presented.

We therefore are compelled to present the question as one not directly decided by any controlling authority. However, we believe that the conclusion, yet to be arrived at, of the Supreme Court of Oklahoma is portended by its opinions in cases construing and applying other similar statutes. We believe that the Circuit Court of Appeals should have been guided by these opinions, and that had it been so guided it would have arrived at an opposite conclusion. This brings us to a discussion of our second point with respect to the statute's construction.

II.

Relevant decisions of the Supreme Court of Oklahoma preclude the construction given the statute by the Circuit Court of Appeals.

The exact section of the statute brought in issue here has never been directly construed by the Supreme Court of Oklahoma. However, the policy of the state with respect to the tax situs of intangibles of foreign corporations has had the repeated attention of the state court in connection with other taxing acts. We respectfully direct the court's attention to the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission*, 173 Okl. 369, 48 P. (2d) 817. This case was brought by this petitioner against this respondent and involved the very same intangibles under the very same circumstances of handling and management involved here. Every circumstance of the case was identical except the taxing statute involved.

The tax involved in the above cited case was the capital stock tax exacted in connection with licensing the corporation to do business in the State of Oklahoma. The pertinent portions of the same were Sections 4 and 6 of Chapter 66, Session Laws of 1931, Oklahoma Statutes 1931, Sections 12376-12378, which were in terms as follows:

> "It shall be the duty of every corporation organized under the laws of this state and of every corporation organized under the laws of any other state, territories, District of Columbia, insular possessions or any foreign country, doing business in this state, to procure annually, from the Oklahoma Tax Commission, a license authorizing the transaction of its business in this state.
>
> "Each such corporation shall pay for such license a fee of one dollar per each one thousand dollars, or portion thereof, of the value of its capital stock employed in Oklahoma, as the value of capital stock em-

ployed in Oklahoma is defined in Section 6 hereof."

Section 6 in part provides:

"For the purpose of computing the amount of license fees hereby imposed and payable by any such corporation, the value of capital stock employed in this state shall be declared to be the value of that portion of the capital stock of the corporation which equals the proportion which the property owned and business done in Oklahoma bears to the total property owned and business done by the corporation."

In the *Chestnut* case, *supra*, respondent had ordered petitioner to attribute the whole of its intangible investments to Oklahoma in its calculation of the capital stock tax due, upon the theory and for the reason that the *locus* of petitioner's management at Tulsa rendered its intangible transactions "business done" in Oklahoma. Thus the same question was presented to the Supreme Court of Oklahoma as was presented here. Can it be urged that there is a difference between "business transacted" and "business done"? We protest that the pivotal phrasing of the two statutes cannot be distinguished. Thus, in our view, the same ultimate decision was required in the *Chestnut* case, *supra*, as is required here.

The Oklahoma court, after detailed examination of the facts, found that the exercise of the management function by petitioner within the State of Oklahoma was insufficient to bring about a tax situs within the state of the intangibles under the definition of the statute which attributed to Oklahoma property localized by "business done" in Oklahoma. The court held that the statute contemplated some actual employment of the capital in Oklahoma transactions, and the opinion is replete with reference to "business transacted" in Oklahoma. The words are so employed as to indicate beyond any shadow of a doubt that the Supreme Court of Oklahoma viewed as necessary to tax situs an actual em-

ployment of the capital in Oklahoma property or in transactions with third parties upon Oklahoma markets. The following is a pertinent quotation from the opinion which will exhibit the identity of the case in point of fact with that at bar.

> "Plaintiff corporation was organized and created under the laws of the State of Delaware and its domicile is in that state. *Bergner & Engle Brew Co.* v. *Dreyfus*, 172 Mass. 154, 51 N. E. 531, 70 A. S. R. 251.
>
> "The rule is that the situs of such intangible property as is sought to be taxed here is, for the purpose of taxation, the domicile of the owner. Cooley on Taxation, Vol. 2, (4th ed.) section 455, p. 1006. See *Kirkland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *State Tax on Foreign-held Bonds*, 15 Wall. 300, 21 L. ed. 179; *Northern Central Ry. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88.
>
> "An exception to the general rule is stated in Cooley on Taxation, (4th ed.) section 465, as follows:
>
> > 'While the "undoubted rule is that, for the purposes of taxation a debt is property at the residence or domicile of the creditor," it is also true that a debt may acquire a situs elsewhere. Business situs has come to be a well recognized term in the law of taxation. Primarily it is an exception to the rule that the situs of intangible personal property is at the domicile of the owner, so as to make property which has acquired a "business situs" in a state other than the domicile of the owner taxable in such state. * * *'
>
> "It is stated by the same author that, although the rule is settled that intangible property belonging to a nonresident may acquire a business situs so as to be taxable, yet just what will constitute a business situs is not susceptible of precise definition. The presumption is that the situs of the intangible property sought to be taxed herein is the domicile of the plaintiff, the *State of Delaware, Monidah Trust Co.*, v. *Sheehan*, 45 Mont. 424, 123 P. 692.

"A consideration of the evidence as to where and for what purpose such property is used is necessary to determine whether or not this presumption has been overcome. The testimony shows that all of the stockholders and directors of the plaintiff corporation resided in Tulsa; that the business of the company was transacted from the Tulsa office; that all of the directors' meetings had been held in Tulsa; that it had an assistant secretary at Wilmington, Delaware, who had custody of a part of the intangible property sought to be taxed; that the assistant secretary did not have the right to sell, transfer, or otherwise dispose of this property without the direction of the Tulsa office; that a part of this property was in Pittsburgh, Pa., in the custody of the Union Trust Company, but that this property also was under the absolute control of the company management at Tulsa; that at the time of making the report the business transacted at the Tulsa office consisted of the operation of an office building owned by plaintiff; that it did not buy, sell or deal in stocks, and that the stocks, bonds, etc., held in Delaware and Pittsburgh were held by the company as an investment; that the condition of the securities held in Wilmington, Del., and Pittsburgh, Pa., so far as the control thereof is concerned, has not changed since the organization of the company up until the hearing before the Oklahoma Tax Commission; that the company paid a corporation license tax to the State of Delaware based on the values of the properties in question; that the property was not used in the business of the plaintiff in this state; that the securities, stocks, cash, government bonds, etc., had been virtually the same since the date of the organization or incorporation of the company.

"There is no evidence that these intangibles which are sought to be taxed here were ever within the boundaries of this state. It is true that they were under the absolute control of the directors and officers of the plaintiff corporation who resided in this state, but that alone is not sufficient to create a 'business situs' in this state of these properties so as to render them taxable

here. *In re Pantlind Hotel Co.,* 232 Mich. 330, 205 N. W. 99.

"The corporation is a legal entity separate and distinct from the directors and officers. The residence of the latter cannot affect the domicile of the former, and we do not consider the residence of the directors a determinating factor herein. Control of the intangible property is a factor to be considered, but such control must be so exercised that the intangible property is actually used or employed by the nonresident corporation in its business transacted in this state. There is evidence that these stocks, bonds, etc., were never used in the business of plaintiff transacted in this state. It is true that the evidence also discloses that the plaintiff did not transact business at any other place, but it is not inconceivable that at the time the plaintiff received its charter from the State of Delaware, or at least before it was licensed to do business in this state, it invested a part of its capital stock in the intangible properties which are sought to be taxed here and held them thereafter as an investment. There is no evidence that plaintiff purchased and held these properties in foreign states for the purpose of evading the tax laws of the state and we cannot presume that it did so."

Further, we direct attention to the last paragraph of the above quotation. The Oklahoma court there plainly distinguishes between fixed investment and "transacting business." There is no way that the foregoing opinion can be read to reconcile with the conclusion reached by the Circuit Court of Appeals in the instant case. The Supreme Court of Oklahoma in the *Chestnut* case, *supra,* held that the very intangibles involved here, owned and handled under the identical circumstances involved here, were not present in Oklahoma so as to be subject to taxes, and held this under a statute apportioning investment on the basis of "business done." The Circuit Court of Appeals in the instant case held that the same intangibles used in the same manner were

present in Oklahoma for tax purposes under another statute employing the determinative phrase "business transacted." We do not believe the two conclusions can be reconciled.

We respectfully submit that the issue is one of local law and that the Circuit Court failed to give effect to the rule annuonced by *Erie Railroad Company* v. *Tompkins, supra.* The opinion of the Circuit Court of Appeals (Tr. 53) makes reference to the case of *State* v. *Atlantic Oil Producing Company,* 174 Okl. 61, 49 P. (2d) 534, and *Ford Motor Company* v. *State,* 178 Okl. 193, 62 P. (2d) 48, in a vein which suggests that the holdings of the Supreme Court of Oklahoma in these two cases are inharmonious with the decision in the *Chestnut* case, *supra.* This is not the fact, as an examination of the two opinions will disclose. The *Atlantic* case, *supra,* involved the assessment of a tax upon intangible receivables which were derived from the sale of oil produced in Oklahoma, the sale of which was contracted in Oklahoma, the delivery of which was made in Oklahoma, and the proceeds of which were payable in Oklahoma. The *Ford Motor Company* case involved the assessment of a tax upon intangibles in the shape of notes which were the product of sales of automobiles to persons residing in Oklahoma, out of sales offices located in Oklahoma, and upon deliveries made from places of business in Oklahoma. The Supreme Court of Oklahoma in the two cases mentioned pointed out clearly that these circumstances were sufficient to show that the intangibles themselves were the product of Oklahoma transactions and the result of trading and capital employment in the state. The opinions are not in conflict with the *Chestnut* decision but are converse applications of the rule announced there. Respondent will not be able to demonstrate a want of harmony in the decisions of Oklahoma relative to taxation of intangibles of a foreign corporation. The opinions are wholly consistent and display a

well reasoned and well settled policy of the state, which we believe to be conclusive on the United States courts under the rule announced in *Erie Railroad Co.* v. *Tompkins.*

III.

Section 5 (b), Oklahoma Income Tax Law of 1935, and its application in the instant case, contravene the "due process" and "equal protection" clauses of the Fourteenth Amendment to the Constitution of the United States.

Our proposition to be argued under this contention is that Oklahoma may not by mere legislative definition domesticate a corporation domiciled elsewhere so as to render taxable to Oklahoma property not otherwise amenable to its taxing jurisdiction as defined by the decisions of this Court under the terms of the Fourteenth Amendment to the Constitution of the United States.

By the terms of Section 5 (b) of the law in question, Oklahoma has attempted to declare by legislative fiat that a foreign corporation which transacts its principal business within the borders of Oklahoma, by such fact has rendered itself a resident so as to bring under the dominion of the state all of its property, wherever located, for taxing purposes. The taxing power claimed is made dependent upon no other circumstance than that the "principal business" of the corporation be transacted in Oklahoma. Naturally there is considerable doubt as to the exact meaning of this phrase, but in this case, according to the application made of the statute to this petitioner, the phrase means that a corporation that holds its directors' meetings in Oklahoma must return the whole of its income there. We think the statute is invalid upon any construction of its terms. The construction given the act in this case, however, makes it unconstitutional beyond doubt.

Before adverting to the opinions of this Court which are cited by the Circuit Court of Appeals as supporting its conclusion, we beg leave to direct the Court's attention to an authority of most intimate parallel in issue of fact and law, which was cited to the Circuit Court of Appeals in our brief there. This is the case of *Newport Company* v. *Wisconsin Tax Commission,* 219 Wis. 283, 261 N. W. 884, 100 A. L. R. 1204, cert. den. 297 U. S. 720, 80 L. ed. 1004.

The *Newport* case, *supra,* is of particular interest because it involved a Wisconsin statute which was identical in terms with that involved here, and for the further reason that the application made of the statute by the taxing authorities was identical with that attempted in this case upon facts and circumstances far more favorable to the tax than those presented here. The tax levied in the *Newport* case was an income tax, and was upon profits arising from the sale of intangibles owned by a corporation foreign to the taxing jurisdiction, and held outside the taxing state. There was no question in the *Newport* case but that the "principal business" of the taxpayer was conducted in the taxing state. Its managing officials were residents of the taxing jurisdiction and its corporate fiscal affairs were transacted there. The Supreme Court of the State of Wisconsin, in reviewing the tax assessment, held the tax invalid upon the sole ground that the section defining a foreign corporation to be a "resident" was invalid as contravening the Fourteenth Amendment. The Wisconsin court pointed out that the validity of the statute was to be tested by the decisions of this Court. After marshalling the whole course of decisions upon the subject as reflected by the opinions of this Court, it held that the statute plainly violated the Fourteenth Amendment and therefore was void. The following is the gist of the decision.

"The state's next contention is that the State of

Wisconsin, if the taxpayer's principal business is located here, may, by legislative fiat, domesticate the corporation for purposes of taxation, and by this process give to its intangible property a local status. Reliance is had upon 2 Cooley, Taxation, Secs. 911 and 914; *Metropolitan Life Ins. Co. of New York* v. *Board of Assessors,* 115 La. 698, 39 So. 346, 9 L. R. A. (NS) 1240, 116 Am. St. Rep. 179; *Ricker* v. *American Loan & Trust Co.,* 140 Mass. 346, 5 N. E. 284; *Hubbard* v. *Brush,* 61 Ohio St. 252, 55 N. E. 829. It seems evident to us that a state may not, by definition, construction, or other process, domesticate a person or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation. To say that it may do so is to contend that the limits of the state's jurisdiction to tax are wholly self-imposed. But it is claimed that, conceding this, a state, as a condition to admitting foreign corporations to do business within the state, may require that the corporation so admitted be taxed upon the same basis as domestic corporations. There are two answers to this: First, section 71.02 (3) (e) was not enacted as a condition to the consent of the state that foreign corporations transact business in Wisconsin; nor was it in existence when this taxpayer was so licensed. Second, assuming that it does constitute a condition, its effect is to attach an unconstitutional condition to the consent that the foreign corporation transact business within the state. The earlier cases in the United States Supreme Court held that a state may impose a tax upon the exercise by a corporation, chartered elsewhere, of its corporate privilege wihin the state, and that the amount or character of the tax is wholly within the discretion of the state. *Home Insurance Co.* v. *New York,* 134 U. S. 594, 10 S. Ct. 593, 33 L. ed. 1025; Delaware Railroad Tax, 18 Wall. 206, 21 L. ed. 888; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 395, 12 S. Ct. 403, 36 L. ed. 164; *Maine* v. *Grand Trunk Ry Co.,* 142 U. S. 217, 12 S. Ct. 121, 35 L. ed. 994: 1 Beale Conflict of Laws, pp, 627 to 629.

However, this view did not survive. In *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355, it was held that a Kansas statute, which made it a condition of foreign corporations entering the state that they should pay a tax or fee consisting of a percentage of their total authorized capital, was invalid, as an unlawful interference with interstate commerce, and as an attempt to tax property outside the state. This decision was followed by a series of cases, notably *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 S. Ct. 232, 54 L. ed. 378; *Atchison, T. & S. F. R. Co.* v. *O'Conner,* 223 U. S. 280, 32 S. Ct. 216, 56 L. ed. 436, Ann. Cas. 1913C, 1050; *Looney* v. *Crane Co.,* 245 U. S. 178, 38 S. Ct. 85, 62 L. ed. 230; see 1 Beale, Conflict of Laws, pp. 629 to 634. See also, 'Indirect Encroachment on Federal Authority' T. R. Powell, 31 Harvard Law Review 321, 572, 721, 932. Professor Beale states: 'Where a state imposes a tax upon a foreign corporation for the privilege of doing local business based upon its entire capital stock which represents in part property permanently outside the taxing state, the tax, though in form an excise, is in effect a tax upon the property. The imposition of such a tax is an attempt to tax property beyond the state's control and is invalid. * * * In each one of the cases cited, the corporation was engaged in interstate commerce. But the vice of taxing extra-territorial values, one of the grounds for the decision here discussed, is equally open to condemnation whether the corporation is doing interstate and local or a purely local business.'

"While the cases and discussion were not addressed to a situation identical with that presented here, they establish principles that are clearly applicable. Assuming that section 71.02 (3) (e), domesticating foreign corporations having their principal business in Wisconsin for the purpose of taxation, constitutes a tax imposed as a condition to the transaction of business in the state, or as a fee for that privilege, it is invalid under the decisions as an attempt to reach property of a foreign corporation which is beyond the taxing jurisdiction

of the state. The cases cited by the state all antedate the *Western Union Tel. Co.* case, and presumably do not survive the rule of that case. While there is much to be said for the contention that the state has unlimited power to exact these conditions, this contention has been repudiated by the United States Supreme Court, and we are bound by the determinations of that court. We also see some merit to the contention of the state that since taxes are thought to have some relation to the protection furnished to the taxpayer, there are more substantial grounds for giving to the state, where the principal business is conducted, jurisdiction to tax all its income, rather than the state of its domicile, to which, in many cases, its only real relation is that it has filed articles of incorporation there. Since this is not a matter of first impression, or even a matter for us to determine, except as we follow the rule of the United States Supreme Court, further discussion would not be profitable."

Obviously the authority is not controlling upon this court. However, we respectfully remind the court that the Wisconsin Tax Commission petitioned *certiorari* to review the decision, and that notwithstanding the fact that the case was decided solely upon a point of Federal Constitutional Law, and involved solely a construction and application of the opinions of this court, the review was denied, 297 U. S. 720, 80 L. ed. 1003.

The *Newport* case was called to the attention of the Circuit Court of Appeals. That court acknowledged that the case was in point and supported petitioner's contention (Tr. 55-56). However, the Circuit Court of Appeals felt that the subsequent opinions of this court in the cases of *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, and *Conn. General Life Insurance Company* v. *Johnson*, 303 U. S. 77, portend a different attitude of this court at the present date than was held at the time *certiorari* was denied in the case of *Newport* v. *Wisconsin, supra.*

We have examined the opinions of this court in *Wisconsin* v. *J. C. Penney Company* and *Conn. General Life Insurance Company* v. *Johnson, supra,* in detail and in vain to ascertain wherein their intendments demonstrate that the circumstances of this case warrant the extension of the taxing jurisdiction of Oklahoma to the intangibles of this petitioner. As we read the opinions last referred to and apply them to the facts at bar, they suggest that the test for the determination of the power of a state to exact this tax is whether or not there is any reasonable relation between the production of income and the opportunities given and the protection afforded by the existence of the state as an orderly, civilized society. The following quotations from *Wisconsin* v. *J. C. Penney Co., supra,* are in our judgment the key to its holding:

> "* * * A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."
>
> "* * * That test is whether property was taken without due process of law, or, if paraphrase we must, whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."

It is our opinion that these authorities support our contention that the statute is invalid, rather than argue its constitutional sufficiency. Just what relation the existence of Oklahoma as an orderly and civilized society had to do with the production of the income sought here to be taxed we are at a loss to say. The sovereignty of Oklahoma had nothing

to do with the protection of the intangibles themselves from theft or physical depreciation. They rested in security in vaults in Delaware because that state existed as an orderly society. Order in Oklahoma certainly had nothing to do with opportunity or facility of acquisition, sale or exchange of the intangibles. Those transactions were made possible and convenient by reason of the existence of an ordered society and sovereignty in the State of New York. Dividends and interest were not rendered collectible upon the intangibles by reason of any function of government in Oklahoma, but because the channels of commercial traffic were kept open by the sovereignties of New York, Pennsylvania and Delaware. Petitioner does not owe its corporate existence to Oklahoma but to Delaware. In short, no dollar's difference would have been reflected in the income sought to be taxed if Oklahoma had continued to exist in the condition of savagery from which it is so recently sprung. The stocks and bonds would have been bought in the same manner at the same places and from the same persons; and the interest and dividends would have been paid in the same amounts and at the same places and been accounted for and disposed of identically whether or not an orderly government or a civilized society had existed in Oklahoma during the years in question.

The only service that can be attributed to orderly government in Oklahoma is that the directors were permitted to convene within its borders, presumably without breach of their peace. If this be deemed sufficient contribution to petitioner's corporate welfare to render the proceeds of the whole of corporate operations amenable to the taxing will of Oklahoma, then petitioner owes the tax as assessed and this petition should be denied. We must suggest, however, that no opinion of this court, or to our knowledge, of any court, has attempted to extend the taxing sovereignty of a state this far, and the implications of such a decision can-

not but portend the death of corporate entity. Stripped of all disguise, the destruction of the corporate entity is the true objective of the act in question. The real, underlying reason that this income is sought to be taxed is that the stockholders of petitioner are residents of Oklahoma. Whether or not the fiction of corporate entity is obsolete and undesirable in the light of modern social developments is not the subject of this argument, and we shall not attempt to debate it here. But we do say that if the entity theory of corporate existence is to be discarded or destroyed it should be done forthrightly and directly and not by indirection through the taxing power.

We therefore submit that under the past decisions of this and other courts the statute here involved, and the application of the same to your petitioner have exceeded the constitutional limitations placed upon the taxing power of the several states.

IV.

Petitioner's Intangibles Did Not Have "Business Situs" in Oklahoma During the Years in Issue.

This proposition is presented only because the trial court held the income to be taxable as having "business situs" in Oklahoma independent of the applicability or validity of Section 5 (b), Oklahoma Income Tax Act 1935, *supra*. The Circuit Court of Appeals ignored this decision of the trial court, and we mention it here only for the reason that it might be urged by the respondent as grounds for affirming the decision of the Circuit Court of Appeals.

Of course, the question of "business situs" is a local one. The policy of the State of Oklahoma with respect to these very intangibles, owned by this very petitioner, has been decided in the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission, supra*. The Supreme Court of

Oklahoma has flatly held that these very intangibles did not have "business situs" in Oklahoma. The trial court ignored the decision and applied the decision of this court in *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193. We are content to rest our case in this regard upon the decision of the *Chestnut* case hereinbefore cited and insist the question is within the rule of *Erie Railroad Company* v. *Tompkins*, *supra*.

Conclusion.

In conclusion we respectfully urge that the decision of the Circuit Court of Appeals is erroneous and should be reviewed for the reason that it announces unwarranted extension of the power of a state to tax property beyond its sovereignty. The decisions of the federal courts are closely watched at this time both by state officials and by taxpayers to sense the pulse and trend of constitutional law as the same is related to taxation. A refusal of this writ will be widely interpreted as a warrant to state taxing bodies to cross state lines at will in pursuit of other sources of revenue. If it is felt that the decision of the Circuit Court of Appeals is right and expresses the true constitutional policy of the United States, then we respectfully suggest that this case be reviewed and affirmed, that there shall be no doubt in the minds of corporate taxpayers of the purport and extent of their rights. If the decision be wrong there is more at stake in a failure to review the case than the incidental loss to this petitioner of taxes paid.

We respectfully pray that the writ be granted and that the judgment of the Circuit Court of Appeals be reversed and the trial court directed to enter judgment as prayed for by petitioner.

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G. Ellis Gable,
Of Counsel.

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NO. 1056

In the Supreme Court of the United States

OCTOBER TERM, 1941

CHESTNUT SECURITIES COMPANY, a Corporation,
Petitioner,

VERSUS

OKLAHOMA TAX COMMISSION,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Address:
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March, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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STATEMENT OF FACTS

(Italics Ours)

There is involved in this action the validity of an income tax assessment made by respondent against the net income of petitioner for the years 1936, 1937, and 1938. The income consisted of interest derived from certain notes and bonds, dividends on corporate stocks and profits derived from the sale of stocks. The assessment was made under Article 6, Chapter 66, Session Laws of 1935. The sections of this Act material to consideration of the question here involved consist of Section 5, and particularly subdivision (b) thereof, and part of Section 6.

Section 5 provides:

"The term 'property owned,' as used in Section 6, shall, for the purpose of this Act, include the classes

of property hereinafter enumerated in this Section, and a taxable situs within the State of Oklahoma is hereby declared to exist with respect to the following:

"(1) All obligations (or other evidences of debt), whether owned by a resident or by a non-resident, when the same are secured by mortgages or liens upon real or tangible personal property located within this State, including bonds of the State or of its municipal or political subdivisions; and, when owned by a resident.

"(2) All unsecured obligations (or other evidences of debt), all obligations or debts secured by mortgages or liens upon property located here or elsewhere, all stocks in any corporation and bonds of any State or municipal or political subdivision thereof.

"(b) *The term 'resident,' as herein used, refers not only to a resident individual, as defined in Section 4 (j), but, in addition, refers to and includes any corporation whose principal business is carried on or transacted in Oklahoma. Such a corporation shall be deemed to be a resident of this State, for income tax purposes, and its income shall be determined, and the tax thereon collected and paid, as if it were incorporated under the laws of Oklahoma, notwithstanding its corporate domicile is elsewhere.*"

Section 6, in part, provides:

"(a) A tax is hereby levied upon every person as defined in Section 4 (b), which tax shall be collected and paid, for each taxable year, upon, and with respect to, the entire net income of such person, which is derived from all property owned and/or business transacted within this State. And a like tax is hereby levied upon every person as defined in Section 4 (b), which tax shall be collected and paid, for each taxable year,

upon, and with respect to, the entire net income of such person which is derived from all property owned partly within and partly without this State and/or business done partly within and partly without this State (commonly known as interstate business), such income derived from property owned partly within and partly without this State and/or business transacted partly within and partly without this State, upon which said tax is hereby levied, to be determined or allocated under the formula or formulae as provided in Section 8 of this Act. Every resident individual shall likewise be subject to the tax hereby levied upon the entire net income of such individual, derived from wages, salaries, commissions, professional or occupational earnings or other compensation received from personal services."

Petitioner is a Delaware corporation which received its charter in Delaware on the 2nd day of December, 1931, and was first licensed to do business in the State of Oklahoma on the 28th day of December, 1931. On January 1, 1932, it acquired, in exchange for its capital stock, securities consisting of stocks, bonds, notes and certain real estate consisting of a small office building situated in Tulsa, Oklahoma. It acquired these securities after it was qualified to do business in this State.

Petitioner thereafter, on December 31, 1933, sold its real estate situated in Tulsa, Oklahoma, and until October 21, 1936, possessed no property located in the State of Oklahoma, and permitted its license to do business in Oklahoma to lapse. In October, 1936, it again acquired certain property in Oklahoma, consisting of oil and gas royalties, and

again applied for and was granted permission to do business in the State of Oklahoma.

During the years 1936, 1937 and 1938, in making its income tax returns to the State of Oklahoma, it did not return for taxation any of the income derived from these securities. It, however, did pay all income taxes derived from its mineral properties in the State. The respondent, Oklahoma Tax Commission, refused to accept such returns and assessed income tax against petitioner on the income derived from such securities in the amount of $3,675.58, which tax petitioner paid under protest and brought its action to recover the amount so paid.

During the years here involved all of the stockholders of petitioner were citizens and residents of Tulsa, Oklahoma; all of the members of the Board of Directors were residents of the State of Oklahoma, and all of its meetings were held in the City of Tulsa, Oklahoma; its main records were kept at Tulsa; all of its business was transacted under the direction of its Board of Directors, meeting and sitting at Tulsa, Oklahoma, no meetings of its Board of Directors having ever been held at any place other than at the City of Tulsa, Oklahoma. None of the securities held by it could be exchanged or sold, nor could any securities be purchased in any manner, except by authority of the official management at Tulsa; all of its officers resided in Oklahoma, except one assistant secretary, who was a resident of Wilmington, Delaware.

This assistant secretary was a part-time employee who was paid $25 a month. His duties included the reception

of income derived from intangible investments of the corporation and the depositing thereof to its bank accounts, and the making of original entry of such receipts on the books of the corporation, and furnishing a copy of such entries to the secretary and treasurer who resided in Tulsa, Oklahoma. He also had custody of certain physical evidences of the intangible investments of petitioner, the safekeeping thereof, and the delivery of such of the same as were sold, and the depositing of the proceeds therefrom in such banks as were designated by petitioner.

He, however, had no authority to draw checks upon any of the corporation's bank accounts, nor had he authority to purchase any securities or property of any kind, or to dispose of any of the assets of the corporation. The funds derived from these investments, as well as from the sale of the securities, were deposited in banks outside the State of Oklahoma, but checks upon said accounts could only be drawn on the order of the Board of Directors, issued at Tulsa, Oklahoma. All sales and purchases of securities made by petitioner during the years here involved were executed upon the New York Stock Exchange by and through brokers employed for that purpose, and delivery of the intangibles bought and sold was made at the City of New York and payment was in such instance made there. Such purchases and sales, however, could only be made on authority issuing from the management in the City of Tulsa, Oklahoma.

No part of the securities here involved were purchased from income accruing from petitioner's Oklahoma min-

eral properties, but the mineral properties of petitioner held in Oklahoma were purchased out of income derived from the proceeds of such securities, which securities were owned and held prior to the acquisition of such mineral properties.

This, in substance, constitutes the facts as set forth by the trial court (Tr. 23-28). From these facts the trial court arrived, among others, at the following conclusions of law:

That the securities here involved, and the income derived therefrom, acquired a "business situs" within the State of Oklahoma, and the defendant, Oklahoma Tax Commission, had the right to assess an income tax on such income (Tr. 28).

That plaintiff's principal and main business was transacted at Tulsa, Oklahoma.

CONTENTIONS OF PARTIES

Respondent contends, under these findings:

1. That petitioner's principal business is carried on and transacted in the State of Oklahoma and is, therefore, under subdivision (b) *supra*, deemed to be a resident corporation and taxable as such;

2. That income was derived from business transacted within the State of Oklahoma and the State, therefore, has authority, power and jurisdiction to collect an income tax on such income.

Petitioner contends:

1. That petitioner's main business was not transacted in the State of Oklahoma and that subdivision (b) of the statute, *supra*, is therefore, not applicable;

2. That if applicable said subdivision of the Act is unconstitutional and contravenes the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States;

3. That the tax is invalid as laid upon income derived from sources without the State.

The trial court found these issues against petitioner and its judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit.

ARGUMENT

Petitioner transacted its principal business in Oklahoma during the years in question and, under subdivision (b) *supra*, it is deemed to be a domestic corporation and its income is taxable by the State as such.

It appears clear to us, under the record in this case, that no other conclusion can be reached except that petitioner's main business, during the years in controversy, was transacted in the State of Oklahoma. Its stockholders all reside in the State; all the meetings of its Board of Directors, during said time, were held in the City of Tulsa, Oklahoma; its seat of government was there located; it there functioned; all the transactions incident to acquiring the securities here involved, and all the transactions incident to producing the income here in question took place at Tulsa, Oklahoma. It is, therefore, clear that its principal

business was there transacted and, under subdivision (b), *supra*, such income is taxable by the State of Oklahoma.

Petitioner, however, contends that that section of the Act is unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United States. In support of this contention the case of *Newport Company* v. *Wisconsin Tax Commission*, 219 Wis. 283, 261 N. W. 884, Certiorari denied, 297 U. S. 720, is cited. This case sustains the contention of the petition. Notwithstanding this decision, however, we submit there is sound reason and authority for sustaining the validity of the Act. It occurs to us that when a foreign corporation enters a state and chooses such state as its commercial domicile and there transacts the major portion of its business the state has authority, under the Constitution, to declare that such corporation, for purposes of taxation, shall be treated as a resident corporation. Surely when a foreign corporation enters a state, seeks permission to transact business there and chooses to make such state its seat of government, and there function as a domestic corporation, a state has authority to say that such corporation shall, for purposes of taxation, be deemed a resident corporation and taxed as such. We think the case of *Commonwealth* v. *United States Cigarette Machine Company*, 119 Va. 447, 89 S. E. 935, is somewhat in point. While the statute there under discussion is not identical with the Oklahoma statute, it is, in some respects similar and what is said by the Court in that case is applicable to the facts here involved. The gist of the opinion is stated in the headnotes and is as follows:

"Code 1904, sec. 1103b as amended by Act Feb. 14, 1912, entitled 'An act to enable certain mining and manufacturing corporations of other states and countries to conduct operations in the States' confers on such corporations in the body of the act the right to carry on their business within the state, but subjects them to the state laws, which include state tax laws. HELD, that the provisions of the act are germane to the title.

"Those provisions in the act declaring that foreign corporations shall be treated as domestic corporations do not render the act invalid on the theory that it violates Const. sec. 50, requiring a law imposing a tax to specifically state such tax, for the act does not impose a tax, but merely authorizes foreign corporations to do business in the state subject to the same rules governing domestic corporations, *including the assessment of taxes.*"

In that case there was also involved the question ot the right of the state to tax certain intangibles. The Virginia statute provides that all foreign corporations receiving a permit to do business in the state, and upon entering the state, shall, for all purposes, be deemed resident corporations. The state there, as here, first contended that the intangibles had acquired a business situs in the state for the purpose of taxaticn, and second, that if they had not acquired such situs, they were nevertheless taxable under this provision of the statute.

The Supreme Court, after discussing the "business situs" rule and indicating that the intangibles had acquired a business situs, proceeded to discuss the validity of this statute and, in sustaining the same, in part, said:

"This act was first passed as chapter 43 of the Acts of 1889-90, p. 33, and has been twice amended, but these amendments need not be specifically mentioned, as they are not material to the issue here. The title of the act as amended (1912, *supra*) reads as follows:

" 'An act * * * to enable certain mining and manufacturing corporations to conduct operations in this state.'

"And the act provides:

" 'That corporations chartered or organized under the laws of other states or countries and authorized to manufacture iron, steel, or other metals, or any articles or material made from metal, wood, cotton, or wool, or to mine ores or coals, may carry on in this state the business authorized by their respective charters or by the articles under which they are or may be organized; and for this purpose may purchase, acquire, lease, sell, mortgage and convey real estate in fee and any other * * * lands or personal property of every kind suitable for their business.'

"In addition it is provided:

" 'That every such corporation desiring to carry on its business in this State shall first comply with the provisions of Section 1104 of the Code of Virginia, and as to its contracts made, property located, and the franchises hereinunder exercised within this state *every such corporation shall for all purposes be deemed and treated as a corporation of this state and be subject to the jurisdiction of the courts thereof.*'

"And the act concludes:

" 'All taxes, dues and demands that may become due to the state of Virginia shall be paid in lawful money of the United States and not in coupons.'

"The testimony given by Gerow, chairman of defendant in error's board of directors, is that the materials of which the machines manufactured by the company consist are iron, steel, brass, aluminum, wood, linen, and in some instances velvet or plush and leather, and that the principal component parts are metal, thus bringing the machines manufactured by this company, as it would seem, clearly within the provisions of section 1103b, *supra*.

"It has to be borne in mind, when the statute in question comes to be construed, that it would have been entirely competent for the commonwealth of Virginia to have denied foreign corporations authority to engage in mining or manufacturing in this state (*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. ed. 657; 19 Cyc. 1251); the state having the power to exclude a foreign corporation from so acting unless it fulfills certain prescribed conditions (*Paul* v. *Virginia*, 8 Wall. 181, 19 L. ed. 357).

"We have cited above ample authorities to sustain the proposition that, where a foreign corporation has an agent within a state by whom investments are made, who collects and transmits them to his principal the 'credits' have a situs within the state, and the state has a right and the power to tax them.

"The authorities cited by counsel for defendant in error show, we think, *that while a statute may not make a foreign corporation a 'citizen' within the meaning of the Federal Constitution, the same statute may domesticate a foreign corporation for purposes of taxation;* and it is well established that:

" 'Instead of merely licensing a foreign corporation to operate a railroad, or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a

domestic corporation with the same franchise and powers that it exercises in the state which originally created it, or with powers that are less or more extensive.' *Missouri Pac. Ry.* v. *Mech.*, 69 Fed. 753, 16 C. C. A. 510, 30 L. R. A. 250; Beale on Foreign Corp., sec. 773.

"Whether the second state has chosen to do this in any particular case is a matter of interpretation. *Memphis, etc., R. Co.* v. *Alabama*, 107 U. S. 581, 2 Sup. Ct. 432, 27 L. ed. 518; *Goodlett* v. *L. & N. R. Co.*, 122 U. S. 391, 7 Sup. Ct. 1254, 30 L. ed. 1230."

In disposing of this question the Circuit Court of Appeals for the Tenth Circuit, said:

"The constitutional power of the state to tax is limited only by its jurisdiction over the objects of its asserted power. *McCullough* v. *Maryland*, 4 Wheat. 316; *Shaffer* v. *Carter*, 252 U. S. 37; *Curry* v. *McCanless*, 307 U. S. 357. In the determination of the question whether the state has exceeded its sovereign jurisdiction in the exaction of a tax upon income, our decision does not depend 'upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.' *Shaffer* v. *Carter*, *supra*, *Curry* v. *McCanless*, *supra*; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435. 'A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society * * * The fact that a tax is contingent upon events brought to pass without a state does not destroy the *nexus* between such a tax and transactions within a state for which the tax is an exaction.' *Wisconsin* v. *J. C. Penney Co.*, *supra*.

* * * * * * *

"The taxpayer cites and relies upon *Newport Company* v. *Wisconsin Tax Commission*, 261 N. W. 884, 100 A. L. R. 1204, Cert. denied 297 U. S. 720, 80 L. ed 1004. This case is directly in point and involved the constitutional power of the State of Wisconsin to tax the income from intangible properties of a foreign corporation, licensed to do business within the state when intangibles sought to be taxed were wholly without the boundaries of the state. The Wisconsin statute is not materially different from the one under consideration here. The Wisconsin court believed itself constrained by the decisions of the U. S. Supreme Court upon the constitutional question. Influenced by what it thought to be the controlling doctrine, it held that the State of Wisconsin could not 'by definition, construction, or other process, domesticate a person or corporation in fact domiciled elsewhere, in order to avoid the application of constitutional principles established by the Supreme Court of the United States relative to jurisdiction for purposes of taxation,' whether such power was conditioned upon the privilege of doing business in the state, or upon the exercise of the power to define and label business carried on or transacted within the state. But the Wisconsin court could see some merit in the contention that 'since taxes are thought to have some relation to the protection furnished to the taxpayer, there are more substantial grounds for giving to the state, where the principal business is conducted, jurisdiction to tax all its income, rather than the state of its domicile, to which, in many cases, its only real relation is that it has filed articles of incorporation there.'

"The Wisconsin court also thought itself constrained by constitutional inhibitions in *Wisconsin* v. *J. C. Penney Co., supra*, wherein the power of the state to tax the privilege of paying dividends out of income

derived from property located and business transacted in the state when such dividends were paid outside of the state to non-resident stockholders was challenged. But the Supreme Court of the United States did not find any constitutional objections to the exaction of the tax because the dividends were paid outside of the state to non-residents, and by its decision, the Supreme Court has made it abundantly clear that the Fourteenth Amendment places only 'extremely limited restrictions' upon the taxing power of a sovereign state. The line of demarcation between jurisdiction to tax, and the absence of it, is clearly discernible from modern authority in the consideration of the recent cases which have passed upon the asserted power of the states to tax intangible property.

* * * * * * *

"It cannot be said here that the acts performed by the non-resident corporation, under the privileges and protection granted by the state, are not directly related and inseparably associated with the realization of the income upon which the state has imposed a tax. It is clear that the state of Oklahoma did not transcend the limits of its jurisdiction, as fixed by the due process and equal protection clauses of the Constitution, by constituting the taxpayer a resident of the State of Oklahoma for income tax purposes" (Tr. 54-57).

If in its opinion the Circuit Court of Appeals placed a proper construction upon the authorities of this Court therein cited, they reach a conclusion contrary to that reached by the Supreme Court of Wisconsin in the case relied upon by petitioner, and would seem to be decisive of the issues here involved, and the writ should be denied.

Subdivision (b) of Section 5, *supra*, is not unconstitutional as applied to the facts of this case. The securities and the income derived therefrom had a taxable situs in this State irrespective of any statute fixing such situs.

Petitioner in this case was engaged in the investment business. This business it conducted in the State of Oklahoma or, as said by the Circuit Court of Appeals in its opinion in the above case, "the determinative act by which the capital of the corporation is invested in securities for the purpose of realization of income, originated in Oklahoma without which there would have been no income. The performance of these determinative acts were dependent upon the privilege afforded and the protection granted to the taxpayer by the State of Oklahoma."

Since the business of the petitoner was actually transacted at Tulsa, Oklahoma, the State has authority, power and jurisdiction to lay an income tax on the net income derived from such business.

This statement, we submit, is sustained by numerous opinions of this Court. The case of *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, is probably the leading case on this question. The gist of the opinion in that case is announced in paragraphs 1, 2 and 3, of the headnotes and is as follows:

> "Intangible property, such as accounts receivable and bank deposits, may have a situs for taxation by a State other than that of the owner's domicile through being part of a business localized in the taxing State.
>
> "The State in which intangible property belonging to a foreign corporation is thus localized cannot be denied constitutional power to tax it upon the ground

that, by legal fiction, the property is so attributable to the State by which the corporation was chartered as to vest in that State the sole power to tax it.

"So held where the corporation maintained in the State of its incorporation an office styled its 'principal' office, in which a duplicate stock ledger and records of capital stock transactions were kept, but actually conducted its business outside of that State.

"A Delaware manufacturing corporation conducted none of its business in that State but established its commercial domicile in West Virginia. There it maintained its general business offices where its general accounts were kept and in which its stockholders and directors held their meetings and from which its officers managed and controlled its operations, including what was done in its plants and sales offices in other states. All contracts of sale were subject to the approval of this main office and all invoices were payable there. It had bank deposits outside of West Virginia resulting from deposits by its West Virginia office of commercial paper received from customers, which deposits were used in meeting payrolls and in paying for materials, equipment, and maintenance and operating expenses in the course of its manufacturing activities but were drawn upon only by the West Virginia office or under its direction.

"*Held*, that the bank deposits and accounts receivable for goods made at the plants and sold through the sales offices were taxable by West Virginia."

In that case there was involved the right of the State of West Virginia to levy an ad valorem tax on accounts receivable belonging to the corporation and upon bank deposits made by it in banks in the State of New York. The

company was organized under the laws of the State of Delaware, and was a Delaware corporation. It was engaged in the manufacture and sale of steel. It did no manufacturing within the State of West Virginia and maintained no special sales office therein. It appears, however, in that case that the general business office of the corporation was located in Wheeling, West Virginia. The general books and accounting records were there kept. The chairman of the board of directors, president, treasurer and secretary there resided. Its stockholders' and directors' meetings were there held. Dividends were there declared and ordered distributed. However, the checks, after having been ordered drawn by the Wheeling office, were drawn and distributed by a dividend-disbursing agent who was a resident of and located in New York City.

It further appears in that case that the corporation maintained sales offices in various cities throughout the United States. Sales contracts were negotiated and orders taken by these offices, subject to acceptance or rejection at the Wheeling office. The manufacturing plants of the corporation were located in the State of Ohio. When sales were made at the various sales offices throughout the different states, invoices for the products sold were prepared and mailed to the office at Wheeling, where they were completed and mailed to the customers. The bills of lading and shipping notices were mailed direct to the customers from the individual plants. All invoices were payable in Wheeling, West Virginia, and when paid, the funds received were deposited in the New York banks. The expenses of conducting the business were, in the majority of

instances, paid by checks issued at Wheeling. All commercial accounts were likewise paid. The out-of-state business was, at all times, conducted under the direction and supervision of the managing office at Wheeling, West Virginia. If any money was expended by those in charge of the plants outside the State of West Virginia, it was expended under the specific direction and control of the general office at Wheeling.

Under the above state of facts it was contended by the taxpayer that since it was a resident of Delaware, that Delaware alone had the right to levy the tax on these accounts receivable and bank deposits. It was the contention of the State of West Virginia that these items had acquired a business situs in the State of West Virginia, and that West Virginia was, therefore, authorized to tax them. After considerable discussion and after citing various authorities sustaining the right of the non-domiciliary state to tax intangibles, when such intangibles had acquired a business situs therein, the court arrived at the conclusion that the intangibles therein involved had acquired a business situs in the State of West Virginia, and that that State, therefore, had a right to tax them, and, in so doing, said:

> "The constitutional authority of West Virginia to tax *the accounts receivable and bank deposits in question* cannot be denied upon the ground that they are taxable solely in Delaware. *The question is whether they should be deemed to be localized in West Virginia.*
>
> "Third: The Corporation established in West Virginia what has aptly been termed a 'commercial domicile.' It maintains its general business offices at

Wheeling and there it keeps its books and accounting records. There its directors hold their meetings and its officers conduct the affairs of the Corporation. There, as appellant's counsel well says, 'the management functioned.' The Corporation has manufacturing plants and sales offices in other States. *But what is done at those plants and offices is determined and controlled from the center of authority at Wheeling. The Corporation has made that the actual seat of its corporate government.*

"The question here is not of the taxation of the plants in other States. The real estate, equipment and all tangible property there located are taxable by those states respectively. *The accounts receivable with which we are now concerned are the proceeds of contracts of sale.* While these contracts are negotiated and orders are taken at the various sales offices throughout the country, they are subject to acceptance or rejection at the Wheeling office. All invoices are payable at Wheeling. Thus the contracts of sale become effective by the action taken at the Wheeling office and there the accounts are kept and the required payments are made. *In the face of these facts, it cannot properly be said that the credits arise either where the goods are manufactured or at the sales offices where the orders are taken.* * * *

"Hence we cannot agree with appellant's counsel that the only fair rule in such a case is one 'which allocates intangibles on the basis of tangible property owned and used in production of material for sale.' This is to confuse two distinct subjects of ad valorem property taxation, the accounts receivable which arise from sales and the manufacturing plants. The accounts are not necessarily localized in whole or in part where the goods are made *but are attributable as choses in action to the place where they arise in the*

course of the business of making contracts of sale. We said, in *Virginia* v. *Imperial Coal Sales Co.* 293 U. S. 15, 20, that we were not able to perceive 'any sound reason for holding that the owner must have real estate or tangible property within the State in order to subject its intangible property within the State to taxation.'

"The tax is laid both on accounts receivable and deposits in banks. It appears that the Corporation has deposit accounts in several States. *The deposits outside West Virginia were made by sending from the Wheeling office to the various banks the original checks or drafts received by the Corporation from its customers.* From these deposit accounts the Corporation, by executive action at Wheeling, pays the amounts required for payrolls, materials, equipment, maintenance and operating expenses as these amounts become payable in the course of its operations in Ohio and other States. Checks and drafts on these bank accounts are drawn at Wheeling, except in connection with the payment of payrolls at certain manufacturing plants where payroll checks or orders are drawn against moneys sent to banks at such points for that express purpose and for meeting incidental items. The agreed statement shows that 'All moneys are controlled and the expenditures directed by the Wheeling office, and if the immediate expenditure be made elsewhere, *such immediate expenditure is made only under specific or general direction and control of the Wheeling office.*' The so-called 'money in bank' is not cash or physical property of the Corporation but is an indebtedness owing by the bank to the Corporation by virtue of the deposit account. *From the Wheeling office proceed the items deposited and there the withdrawals are directed and controlled.* In the light of this course of business as shown by the agreed statements of fact, we

find no sufficient basis for concluding that the bank accounts thus maintained and controlled *were properly attributable to the Corporation at any place other than at its general office at Wheeling. If there were any special circumstances by which any of these deposits could be deemed to have been localized elsewhere, they do not appear upon the present record.*

* * * * * * *

"Our conclusion is that appellant has failed to show that West Virginia in laying the tax has transcended the limits of its jurisdiction and thus deprived appellant of its property without due process of law."

See also in this connection *New York ex rel. Whitney* v. *Graves*, 299 U. S. 366; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234; *Smith* v. *Ajax Pipe Line Company*, 87 Fed. (2d) 567, and authorities cited and referred to in these opinions. We submit that the Circuit Court of Appeals in holding that petitioner's principal place of business was carried on and transacted at Tulsa, Oklahoma, is abundantly supported by these authorities. This being true, the income derived therefrom was subject to taxation by the State of Oklahoma. There is no material distinction between the facts here involved and the facts in the Wheeling case, *supra*. It is true, as stated by counsel for petitioner that the securities here involved were at all times held and kept outside of the State; that the interest derived from the notes and bonds in question, and the dividends derived from the stocks, were collected outside of the State, and the proceeds thereof kept on deposit in banks outside of the State, and that the actual transfer of the stocks sold took place outside of the State, and the proceeds

derived therefrom were deposited in banks outside of the State, but, as said by the Supreme Court in the Wheeling case, what was done at those places was determined and controlled from the center of authority at Tulsa, Oklahoma. The petitioner has made that the actual seat of its corporate business.

In the Wheeling case none of the products which were the subject of sale were manufactured in West Virginia. No sales actually took place in that State, but what took place in those states emanated from authority at Wheeling. The accounts arising out of the business were kept in West Virginia; the tax was assessed by West Virginia on these accounts. This Court sustained the tax.

In the instant case, all records in connection with petitioner's investment business are kept at Tulsa, Oklahoma; all contracts are there made. It is true that the collections of income from these securities are made outside the State, and a record made thereof by an agent of petitioner kept outside the State. Duplicates of these records are made and forwarded to Tulsa, Oklahoma, where all the permanent records of the petitioner are kept.

A large part of the income here involved arises out of profit derived from the sale of stocks. The contracts of such sales are all made and executed at Tulsa, Oklahoma; the income derived from these securities are collected and kept outside of the State under and by virtue of the authority emanating from Tulsa, Oklahoma. It will therefore be seen that there is no material distinction between the facts of this case and the facts in the Wheeling case.

The only distinction being that in the Wheeling case the taxpayer was conducting a commercial and industrial business, while in the instant case petitioner is engaged in the investment business. The basic facts upon which the Court based its conclusions in the Wheeling case are not essentially different from the basic facts in this case. We therefore submit that the conclusions reached by the Circuit Court of Appeals in the instant case is abundantly supported by the Wheeling case and other opinions of this Court.

The decisions of the Supreme Court of this State do not preclude the sustaining of the assessment here involved by the federal courts.

Petitioner contends that relevant decisions of the Supreme Court of this State preclude the Federal Court from construing the Oklahoma Income Tax Act of 1935 in such a manner as to attribute the State of Oklahoma a taxable situs as to the income here involved.

In support of this contention petitioner relies mainly on the case of *Chestnut Securities Company* v. *Oklahoma Tax Commission*, 173 Okla. 369, 48 Pac. (2d) 817. In that case there was involved the validity of a capital stock tax assessment, an assessment for the privilege of conducting business in the State of Oklahoma. The assessment was made under the provisions of Section 3, Chapter 195, Session Laws of 1933, which provides:

> "It shall be the duty of every corporation organized under the laws of this State and of every corporation organized under the laws of any other state, territory, District of Columbia, insular possession or any

foreign country, and other associations and organizations as enumerated in Section One (1) hereof, doing business in this State, to procure annually, from the Oklahoma Tax Commission, a license, authorizing the transaction of its business in this State.

"Each such corporation, association or organization shall pay for such license, a fee of one dollar per each one thousand dollars, or portion thereof, of the value of its capital stock employed in Oklahoma, as the value of capital stock employed in Oklahoma is defined in Section Five (5) hereof."

It will be noticed that under that Act the assessment was based on the value of the capital stock employed by the corporation in its business in Oklahoma. That Act levied a tax at the rate of $1.00 per thousand of the value of the capital stock employed in Oklahoma. In arriving at the assessment the Tax Commission, in valuing the capital stock employed by petitioner in Oklahoma, took into consideration the value of the securities here involved on the theory that they had acquired a local or business situs in the State. The Court held that the facts in that case were insufficient to show that the securities were used in connection with the business actually carried on in Oklahoma and, therefore, insufficient to establish a business situs. Some of the facts appearing in the instant case also appeared in that case but material facts have been shown and found by the trial court to exist, which did not exist in the case when presented to the Supreme Court of this State. In discussing the case, the State Court stated that, among other things, the evidence disclosed the following facts:

" * * * that it (petitioner) did not buy, sell or deal in stocks, and that the stocks, bonds, etc., held in Delaware and Pittsburgh were held by the company as an investment; that the condition of the securities held in Wilmington, Del., and Pittsburgh, Pa., so far as the control thereof is concerned, has not changed since the organization of the company up until the hearing before the Oklahoma Tax Commission; that the company paid a corporation license tax to the state of Delaware based on the values of the properties in question; *that the property was not used in the business of the plaintiff in this state; that the securities, stocks, cash, government bonds, etc., had been virtually the same since the date of the organization or incorporation of the company.*

* * * * * * *

"The corporation is a legal entity separate and distinct from the directors and officers. The residence of the latter cannot affect the domicile of the former, and we do not consider the residence of the directors a determining factor herein. Control of the intangible property is a factor to be considered, but such control must be so exercised that the intangible property is actually used or employed by the non-resident corporation in its business transacted in this state. There is evidence that these stocks, bonds, etc., were never used in the business of plaintiff transacted in this state. *It is true that the evidence also discloses that the plaintiff did not transact business at any other place but it is not inconceivable that at the time the plaintiff received its charter from the state of Delaware, or at least before it was licensed to do business in this state, it invested a part of its capital stock in the intangible properties which are sought to be taxed here and held them thereafter as an investment.* * * * "

It will be observed that the Supreme Court of this State pointed out in its opinion that, under the evidence as disclosed in that case, the corporation did not deal or traffic in any of the securities there involved; that it did not buy, sell or deal in stocks; that the securities, stocks and bonds then held by it had been virtually the same since the date of the organization or incorporation of the corporation. It also pointed out that the evidence did not show that the stocks and securities had been acquired by the corporation after it was qualified to do business in this State. It will, therefore, be observed that certain material facts, which the State Court held material to establish a business situs and which were lacking in that case, are present in this case.

There was involved in the state case the assessment of a tax for the fiscal year beginning July 1, 1932, and ending June 30, 1933. At that time the corporation had not dealt or trafficked in any of its securities; it had not, at that time, reinvested any of the income derived therefrom, but the securities, at the time the assessment was made, were the identical securities which the corporation had and held immediately after having qualified to do business in this State.

Suppose it had been shown in that case that the corporation at that time dealt and trafficked in the securities; suppose it had been shown that it acquired these securities subsequent to the time it qualified to do business in this State, and that all the negotiations and transactions incident to the acquiring of these securities took place in

the State; that the corporation had received income from these securities and had reinvested the same by purchasing other securities and that the contracts for the purchase thereof had been entered into and concluded in the State; that it had sold large blocks of stock and that the contracts of sale had been entered into and executed in Oklahoma, would the Court then have said that these securities were not used in connection with business conducted in Oklahoma? We apprehend not.

In the instant case it is shown that such transactions were had in connection with these securities and that these transactions all took place at Tulsa, Oklahoma. Moreover, the Supreme Court did not hold in that case that petitioner's principal business was not transacted and carried on in Oklahoma but, on the contrary, it held the evidence disclosed that it did not transact any business at any other place except in Oklahoma.

The income acquired by petitioner in the instant case certainly resulted from the transaction of business at some place, and if, as stated by the State Supreme Court in the Chestnut Securities case, *supra*, it transacted business at no other place than in the State of Oklahoma, certainly the State had a right to tax such income.

We submit that the facts are materially different in the instant case than in the case as presented to the Supreme Court of the State. Therefore, the mere fact that the Supreme Court in that case, under the taxing act there construed and under the evidence there produced, held that the securities had not acquired a business situs for the purpose of assessing a corporation license tax, does not

preclude this Court, or any Federal Court, when construing a different taxing act under a different state of facts, from arriving at a different conclusion.

The facts in the instant case bring the case within the rule announced by the Supreme Court of this State in the case of *State* v. *Atlantic Producing Oil Company*, 174 Okla. 61, 49 Pac. (2d) 534, rather than within the rule announced in the Chestnut Securities case, *supra*. In that case the following rule is announced in paragraph 2 of the syllabus:

> "Intangible personal property consisting of accounts receivable in this State, arising from business operations carried on in this State, owned by a foreign corporation engaged in business in this and other states, may have or acquire a business situs in this State, so as to be subject to ad valorem taxation in this State."

We submit that nothing that was said by the Supreme Court of the State in the Chestnut Securities case, *supra*, or in any other decision, precluded the Circuit Court of Appeals for the Tenth Circuit, or any other Federal Court, from exercising its own independent judgment as to the validity of the assessment here involved.

CONCLUSION

In conclusion we summarize our contentions as follows:

(1) The record clearly establishes that petitioner's principal business was transacted and carried on in the City of Tulsa, Oklahoma, therefore, under the provisions

of subdivision (b) of Section 5 of the Income Tax Act of 1935, it must, for income tax purpose, be deemed to be a resident corporation and that its income is taxable as such.

(2) That, as applied to the facts of the instant case, said subdivision (b) is not unconstitutional.

(3) That the income here involved had a taxable situs in the State of Oklahoma, irrespective of any statutory enactment fixing such situs.

(4) That the decisions of the Supreme Court of this State did not preclude the Circuit Court of Appeals for the Tenth Circuit from exercising its own independent judgment as to the validity of the assessment here involved.

(5) That in sustaining the assessment, the Circuit Court of Appeals for the Tenth Circuit followed and applied applicable decisions of this Court, and that the writ should, therefore, be denied.

Respectfully submitted,

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